Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1621

REYNOLDS METALS COMPANY,

Petitioner,

v.

ALUMINUM COMPANY OF AMERICA, and
NATIONAL CAN CORPORATION,

Respondents.

RESPONDENT ALUMINUM COMPANY OF AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statutes and Rules:

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Other Authority:

35 U.S.C.A. §102, Revision Notes 10n

TABLE OF ABBREVIATIONS

"Pet."	—Reynolds Petition for Writ of Certiorari
"App. to Pet."	—Reynolds Appendix to Petition for Writ of Certiorari
"PRM"	—Reynolds Trial Exhibit
"Pl. Post Trial Brief"	—Plaintiff Reynolds Post Trial Brief
"dep."	—Pre-trial deposition testimony (preceded by name of deponent)
"DA"	—Defendant Alcoa Trial Exhibit

Reference to defendants' Joint Appendix to the United States Court of Appeals for the Seventh Circuit is Volume followed by page. For example:

"Resp. Joint App. I: 221" refers to Volume I at page 221.

"Resp. Joint App. IV: 621a" refers to Volume IV at page 621a.

Emphasis throughout is ours unless otherwise noted.

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RESPONDENT ALUMINUM COMPANY OF AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

No reason exists for granting the requested writ.

The holding sought to be reviewed is not in conflict with the applicable decisions of this Court or with the law as applied in other Courts of Appeal. Nor does it involve any issue of public importance—constitutional, statutory or otherwise. It is an entirely conventional holding of patent invalidity on the threshold issue of lack of novelty under 35 U.S.C. §102 because of prior use and knowledge of the claimed subject matter. The reasons advanced by petitioner as a basis for granting the writ are synthetic and are premised upon erroneous assertions both as to the nature and character of the decisions below and as to the factual content of the record.

QUESTIONS PRESENTED

Questions 1 and 2 are totally unrelated to the circumstances of this case and are purely of abstract character.

Questions 3 and 4 are premised on mischaracterizations of the Court of Appeals decision and the basis therefor and are not properly presented by the record in this case.

COUNTERSTATEMENT OF THE CASE

The Claimed Subject Matter

The Court of Appeals used as its starting point the District Court's finding that the claimed subject matter identified only two significant differences over the prior art, namely:

1) the elimination of annealing or stress relieving in making D&I aluminum cans,[1] and

2) selecting alloying elements of sufficient ductility and strength to cold roll and draw iron the aluminum sheet into a can body without thermal treatments. (App. to Pet. 3a)

The excluded "thermal treatments" specifically relate to annealing and stress relieving effected in furnaces as a separate operation. At Resp. Joint App. I: 284, Bylund testified:

> Q. Is there any place in that Patent Specification where you give any definition or particular meaning to the words "thermal treatment"?
>
> A. . . . thermal treatment, as I use it, is a—specific thermal treatment is a separate and distinct operation such as it is on . . . . [PRM] "2004".[2]

[1] D&I is short hand for draw and iron.

[2] PRM 2004 shows separate anneal and stress relieving furnaces.

Such was petitioner's position before the District Court in construing the patent claims (Pl. Post Trial Brief p. 82):

> Annealing or stress relieving kind of operations talked about in the Bylund patents, and as referred to in the claims thereof, are those heat treatments that involve putting coils of materials in special furnaces and leaving them there for extended periods of time at high temperatures to soften them as was the universal practice in producing draw and iron can stock prior to Bylund's invention.

Background Draw and Iron Can Making

Petitioner Reynolds and others commercially drew and ironed beer cans from annealed and/or stress relieved 3004 and 3003 aluminum alloy sheet as a part of the prior art.

The Specific Prior Art Relied Upon by the Court of Appeals in Holding Invalidity for Lack of Novelty

The opinion of the Court of Appeals is based squarely upon and is limited to the anticipatory character of the prior manufacture by the Metal Flo Corporation of drawn and ironed cans from unannealed aluminum alloy sheet without the intervention of any thermal treatment. The evidence of such anticipatory prior manufacture is entirely in the form of unrebutted deposition testimony and documents, the facts therein being undisputed on the record.[3]

Metal Flo fabricated and sold thousands of containers (sonobuoy housings) drawn and ironed from full hard (unannealed) 3003 aluminum alloy sheet without any intervening thermal treatment (Grigorenko dep. at Resp. Joint App. II: 637,647,649). It is undisputed that Metal Flo had

[3] The District Judge did not permit the reading of depositions or portions thereof into the record but only allowed the introduction of the unread transcripts and exhibits as part of the record.

no furnaces or other facilities for annealing or stress relieving either the metal sheet or the can bodies.

The District Court Decision

Careful review of all portions of the District Court decision that relate to Metal Flo (See App. to Pet. pp. 30a, 32a, 33a, 34a and 41a and Conclusions of Law 10, 18 and 50 at 48a, 50a and 58a respectively) shows no specific consideration whatsoever by the District Court of the anticipatory Metal Flo commercial fabrication of sonobuoy housings relied upon by the Court of Appeals.

In adopting the text of Reynolds' argumentative briefing as his opinion,[4] the District Judge (*after* assuming the "differences" noted above and deciding the issue of obviousness under §103) generally dismissed the prior art under §102 (App. to Pet. 30a) as being "insufficient" or as being "instances of non-public letters or memorandums or incomplete experimental can bodies of uncertain origin . . ." or as being ". . . experimental, incomplete and long forgotten and abandoned when *defendants* attempted to make a drawn and ironed can[5] . . ." and upon other equally immaterial grounds.

Contrary to petitioner's repeated assertions (Pet. 7, 24, 25, 26, 29, 34) the District Court did not make any "finding" that the *Metal Flo process included annealing.* Metal Flo's lack of annealing facilities is undisputed (*supra* pp. 3-4). The only reference to "annealing" in the District Court opinion (Pet. 24) has been improperly taken from

[4] As set forth in the Appendix hereto (1b, 1c), only six short passages in the District Court's opinion originated with the Court. The remainder was a verbatim adoption of text from petitioner Reynolds argumentative post trial briefs. Although numerous proposed findings of fact were presented (nearly 1000 by Reynolds alone), the District Court adopted none of them.

[5] *Defendants'* can production is immaterial under §102.

its limited and specific context of discussion of a particular handwritten comment on a copy of the Massingill patent[6] in conjunction with the issue of "fraud on the Patent Office" (App. to Pet. 41a-42a). In there making the exculpatory statement quoted by petitioner that—"Thus, it is quite reasonable to conclude that Massingill does in fact involve some annealing—" the District Court was doing no more than excusing certain assertions of annealing made by Reynolds' attorney to the Patent Office. As there noted by the District Court—"All that Mr. Palmer did was to *suggest* to the Patent Examiner that some anneal occurred" and that "we have merely an *argument* put forth for the evaluation of the expert examiner, not a fraudulent statement of fact".

The District Court made no *finding* that the Metal Flo process did, in fact, involve annealing.

ARGUMENT

Petitioner presents no valid reason for granting the requested writ.

A. The Petition Presents No Important Question of Federal Law

[*As to Alleged Decline in Innovation and Judicial Hostility to Patents (Pet. 8-10, 13-17, 21-22, 37-41)*]

Novelty under §102 is the threshold statutory condition for patentability.

No amount of emotional rhetoric and statistics unrelated to case merit can convert this case from a routine and conventional holding of lack of novelty under 35 U.S.C. §102 into one on which the economic future of the Re-

[6] The Massingill patent repeatedly emphasizes that drawing and ironing and subsequent forming are carried on "without annealing" (Resp. Joint App. IV: 706a et seq.; Col.3, lines 6-9, 15-17, 21-22; Col.10, lines 11-13; Col.11, lines 70-73; Col.12, lines 67-75).

public depends. Even if one accepts, *arguendo,* the existence of decline in innovation and further, that such decline is attributable to the current statutory conditions for patentability, the problem posed is clearly one that lies with Congress and not with this Court. In the implementation of the constitutional standard, this Court pointed out in *Graham* v. *John Deere Co.,* 383 U.S. 1 at 6 (1966):

> . . . Congress may not authorize the issuance of patents whose effects are *to remove existent knowledge from the public domain,* or *to restrict free access to materials already available.*

and

> Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. . . . Within the scope established by the Constitution, Congress may set out conditions and tests for patentability. . . . It is the duty of the Commissioner of Patents and of the courts in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress.

In the instant case, anticipatory knowledge clearly existed that containers had been drawn and ironed from full hard (unannealed) aluminum alloy without the intervention of a thermal treatment. Innovation will in no way be stimulated by the overhanging threat of an invalid patent which serves only to remove existent knowledge from the public domain.

No amount of emotional rhetoric can convert the holding below from a conventional holding of patent invalidity

turning on its own facts into an important question of federal law that should be settled by this Court.

B. Secondary Considerations That "May Have Relevancy" Under 35 U.S.C. §103 Are Not Relevant to Determination of Novelty Under §102

[*As to the Alleged Quantum of Innovation and the Purported Adoption Thereof by the Industry (Pet. 10-11, 17-20)*]

Apart from the fact that the industry had been commercially producing drawn and ironed cans from 3004 full hard (unannealed) aluminum alloy sheet for about 4 years before the issuance of the first of the patents here in suit, "secondary considerations" that "may have relevancy" to the determination of *obviousness* under 35 U.S.C. §103 (*Graham* supra at p. 18) do not and cannot derogate from the *threshold* statutory requirement of novelty. A single instance of prior use or knowledge is sufficient as a matter of law. *Coffin* v. *Ogden,* 85 U.S. 120 at 124 (1873); *Egbert* v. *Lippman,* 104 U.S. 333 at 336 (1881).

Whatever may have been the economic or other reasons behind the widespread expansion in the utilization of the draw and iron method of aluminum can fabrication from 1968 to date, such are neither relevant or material to the resolution of the threshold issue of lack of novelty.

C. Prior Art Not Relied Upon by the Court of Appeals as the Basis for Its Holding Is Here Immaterial

[*The Massingill Patent and the Metal Flo Steel Beverage Can Program Are Immaterial (Pet. 22-30)*]

Petitioner engages in a lengthy exercise in obfuscation aimed at diverting this Court's attention from the specific and limited base of the Court of Appeals holding. In such presentation, petitioner repeatedly reasserts and

stresses the nonexistent finding that the Metal Flo process involved "annealing" (*supra* p. 4). The arguments based upon this false premise shift between evidence relating to the production rate limitations of the hydraulically powered Metal Flo draw and iron press equipment, the Massingill U.S. Patent disclosure and its relation to the prosecution of the patents in suit, and to the Jones & Laughlin steel beer can development program—*none of which formed any basis for the holding of the Court of Appeals.*

No such obfuscation can divert attention from the specific and undisputed factual basis for the Court of Appeals holding of lack of novelty under §102.

D. There Is No Conflict With Decisions of This Court

[*There Was No De Novo Redetermination of Facts Or Disregard of Rule 52(a) by The Court of Appeals (Pet. 30-34)*]

The Court of Appeals made no "redetermination" of facts nor did it disregard Rule 52(a). The decision, a model of brevity in an otherwise prolix environment, accepted the District Court's interpretation as to the nature of the claimed subject matter and then considered the undisputed deposition testimony and documentary evidence of record that established a specific instance of an anticipatory prior use and knowledge (i.e., the Metal Flo sonobuoy housing—*supra* p. 3). This was a threshold issue that the District Court never considered, as clearly evidenced by the lack of any specific reference thereto in the entire District Court opinion.

This action by the Court of Appeals, while giving effect to the undisputed facts of record, did not involve any negation or disregard of findings made by the District Court.

To give effect to undisputed facts on an issue not considered by the District Court is neither a "de novo redetermination" of facts nor a contravention of Rule 52(a).

The action of the Court of Appeals was in full accord with the criteria enunciated in *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969). The petitioner's quoted extract (Pet. 31) continues:

> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed".

There is no conflict between the holding of the Court of Appeals and applicable decisions of this Court.

E. There Is No Conflict With Other Courts of Appeal (Pet. 34-36)

Petitioner's assertion of conflict with other Circuits is premised upon the Court of Appeals purported overlooking the nonexistent "finding that Metal Flo involved heat and annealing . . . and that the Bylund patent claims are substantially different in that there are no such thermal treatments" (Pet. 34). No finding that Metal Flo involved "annealing" was ever made by the District Court (supra p. 4).

There is no conflict between the Seventh Circuit Court of Appeals and the other Courts of Appeals in the application of §102, either generally or in this particular case. In *Popeil Bros. Inc.* v. *Schick Electric, Inc.*, 494 F.2d 162, 164 (7th Cir. 1974) the Seventh Circuit Court stated:

> A previous patent, printed publication or domestic product anticipates a purported invention only where,

> except for insubstantial differences, it contains all of the same elements operating in the same fashion to perform an identical function.

Application of §102[7] has never required absolute and literal identity, since such requirement would render the statute a practical nullity. As noted by this Court in *Smith* v. *Hall,* 301 U.S. 216, 232 (1936):

> It is immaterial that his structure for using the method was neither the best possible nor as skillfully designed or used as that later employed by Smith.

and at 232-33:

> His statement . . . shows clearly that he contemplated the continuous operation of an incubator . . ., by a procedure *substantially that* of the Smith claim . . . the renewed effort . . . embodying the same principles, although with an immaterial variation in structure, and the fact that both incubators functioned, are convincing evidence that Hastings knew and used in appropriate combination . . . the *essential elements* of the Smith claim.

Petitioner's cases clearly recognize that absolute literal identity is not required. See *Schroeder* v. *Owens Corning Fiberglas Corp.,* 514 F.2d 901 at 903 (9th Cir. 1975)—"anticipated only if another invention already known and used is identical in substance"; *Paeco* v. *Applied Moldings, Inc.,* 562 F.2d 870 at 873 (3rd Cir. 1977)—"substantially identical"; *Shanklin Corp.* v. *Springfield Photo Mount Co.,* 521 F.2d 609 at 616 (1st Cir. 1975)—"essentially the same way".

---

[7] And predecessor statute. No change in this aspect of patent law was introduced in the 1952 Act. (See 35 U.S.C.A. §102, Revision Notes).

In the case at bar Metal Flo's sonobuoy fabrication fully meets the accepted test that—"all of the same elements are found in the same situation and united in the same way to perform an identical function".

The only difference was one of mere thousandths of an inch dimension in the wall thickness of the finished product.[8] It is in this limited area of dimensional difference and in rebuttal of Reynolds' contentions below, that the Court of Appeals cited *Popeil* to clearly delineate such dimensional differences as "insubstantial distinctions".

There is no conflict in fact or in principle between the Seventh Circuit Court of Appeals and other Courts of Appeal in the application of 35 U.S.C. §102.

CONCLUSION

No reason exists for granting the requested writ and the petition should be denied.

Respectfully submitted,

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[8] The lack of significance of these dimensional differences, as recognized by the Court of Appeals, is clearly demonstrated by Metal Flo's actual manufacture of beer cans from various aluminum alloys in tempers up to a full hard without the intervention of any thermal treatment and delivery thereof to Reynolds. Prior actual knowledge thereof was possessed by both Metal Flo and Reynolds as evidenced by Reynolds memorandum DA 228A set forth in Appendix hereto at 3b.

APPENDIX

App. to Pet. 6a

This Court has determined to include all of the above items in this one document in the interest of clearly stating in one place the factual conclusions and the legal reasons therefor in this protracted and hotly contested case.

This case was tried to the Court without a jury during fifteen trial days by most able and experienced counsel. The Court heard extended oral argument for one full day and has entertained and carefully considered briefs and proposed findings and conclusions.

This shall constitute the findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

App. to Pet. 9a

The chronology of Bylund Inventions and patent applications filed in the United States Patent Office has been provided to the Court in graphic form. The Court now adopts the same and incorporates same here as evidenced by the attached appendix A.

* * *

App. to Pet. 9a

To the extent that it matters this Court finds Mr. Bylund to be highly credible. During long and vigorous cross-examination by most adroit counsel Mr. Bylund's credibility remained intact.

App. to Pet. 23a

In this trial evidence of ex parte tests which were made during its course was offered and admitted. Notwithstanding their receipt into evidence this Court takes a very dim

view of same and does not here deem them as helpful or relevant. This view is apparently shared by others. See *Illinois Tool Works, Inc.* v. *Foster Grant Co.*, 547 F. 2d 1300 (7th Cir. 1976), and *Popeil Brothers* v. *Schick Electric, Inc.*, 356 F. Supp. 240 (N.D. Ill. 1972).

App. to Pet. 29a

A recent comment by Judge William C. Conner is pointedly relevant:

> "When the evidence establishes that a number of persons skilled in the art, having access to all the necessary means and facilities, actually attempted over a substantial period of time to solve a problem and were unable to do so, I simply don't see how a court, merely on the basis of hindsight, can say that the solution was obvious to such persons at the very time they were searching vainly for it." *American Patent Law Association Bulletin*, October-November 1977, pp. 618-627

App. to Pet. 37a

There has been much talk of fraud in this case. (Alcoa has taken a "softer" approach than National on this subject.)

INTERDEPARTMENTAL CORRESPONDENCE
R-88 (REV. 7-63)

J.E.C.G. JUN 7 1965

FROM	AT	TO	AT
E. G. MAEDER	CONTAINER DEVELOPMENT	L. V. PAYTON	FIDELITY BUILDING

COPIES TO

E. P. BURLEW - FIDELITY BUILDING

SUBJECT	DATE
METAL FLO CORPORATION	MAY 28, 1965

I WAS CALLED TO MR. DAVID REYNOLDS'S OFFICE TODAY, WITH E. P. BURLEW, TO MEET MR. CHARLES BROWN, THE HEAD OF METAL FLO CORPORATION. MR. BROWN PRESENTED MR. REYNOLDS WITH SEVERAL PRODUCTS MADE ON THEIR UNIQUE MULTI-STAGE DRAWING PROCESS. AMONG THESE WERE A NUMBER OF TWELVE-OUNCE DRAWN AND IRONED BEER CANS. JIM STUART MADE SEVERAL ALLOYS IN .020" GAUGE AVAILABLE TO METAL FLO FOR FABRICATION INTO CANS. THE ALLOYS ARE 3003, 3004, 5050, 5052, AND 5086, IN TEMPERS UP TO H-18. ALL OF THESE ALLOYS WERE FORMED INTO CANS OF .010" WALL THICKNESS. THE WALL THICKNESS VARIES UP TO .0005" AROUND THE EDGE. THE CAN SURFACE LOOKS VERY GOOD, AND IS COMPARABLE TO OURS. THEY WEIGH 52.5 POUNDS PER THOUSAND; HOWEVER, THE WEIGHT APPEARS TO BE INCIDENTAL SINCE THEY USED SOME EXISTING TOOLING TO MAKE THESE FIRST SAMPLES. THEY CLAIM THEY CAN MAKE THINNER WALL CANS.

I AM ATTACHING A COPY OF A PUBLICATION ON THIS PROCESS. THEY EMPLOY TELESCOPIC PUNCHES TO MAKE LONG SHELLS, WHICH IS A VERY OLD IDEA. EACH TELESCOPIC PUNCH MEMBER REQUIRES A PROPULSION MECHANISM; THEREFORE, THE HYDRAULIC PRESS PRINCIPLE LENDS ITSELF MOST IDEALLY TO THIS OPERATION. FOR A SHORT CAN LIKE OUR BEER CAN, ONLY TWO TELESCOPIC PUNCH MEMBERS WOULD BE REQUIRED. THIS IS WHAT WE ARE DOING, EXCEPT WE BREAK IT UP INTO A SEPARATE CUPPING OPERATION. YOU WILL NOTE IN THE LAST PARAGRAPH THE LIMITATIONS THEY ADMIT EXIST. THEY ARE USING A DOUBLE ENDED HYDRAULIC PRESS SIMILAR TO THE OLD KAISER D AND I BODYMAKER. TO OBTAIN LARGE PRODUCTION, THEY TALK OF MULTIPLE UNIT ARRANGEMENTS AT EACH END. IT APPEARS FROM MR. BROWN'S STATEMENTS THAT THEY WOULD CONSIDER AS MANY AS SIX UNITS ARRANGED ON EACH SIDE. YOU ARE VERY WELL AWARE THAT THE GAME OF ARRANGING INDEPENDENT SINGLE UNITS INTO AN INTERDEPENDENT WHOLE IS ALSO OPEN TO US. SUCH A STEP HAS TO BE VERY CAREFULLY CONSIDERED. MY OWN SYSTEM EFFICIENCY STUDIES SHOW THAT ONE CANNOT TAKE INDEPENDENT UNITS AND ARRANGE THEM INTERDEPENDENTLY UNLESS THE UNIT EFFICIENCY IS BETTER THAN 97 - 99%. ON THE AVERAGE, WE ARE STILL BELOW 95% AT OUR WHITE BEAR LAKE CAN PLANT.

TO PASS PROPER JUDGEMENT ON SUCH A PROCESS, WE WOULD HAVE TO ESTABLISH: (1) HOW FAST A SINGLE UNIT CAN PERFORM BY ITSELF; (2) HOW EFFICIENT A SINGLE UNIT IS OVER VERY EXTENDED RUNS; (3) WHERE THE POINT-OF-NO-RETURN IS WHEN ADDING UNITS INTO A SINGLE MACHINE.

E. G. MAEDER

FE

ATTACHMENT

METAL v. ALCOA AND NATIONAL CAN
S74-172 N.D. Ind.
D.A., Ex. No. 228-A
Date 10-6-72
5183

DEFENDANT'S EXHIBIT
P/T DA
NO. 228A

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1979
No. 79-1621

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v.

ALUMINUM COMPANY OF AMERICA, and
NATIONAL CAN CORPORATION,
Respondents.

Certificate of Service

This will verify that three copies of the foregoing RESPONDENT ALUMINUM COMPANY OF AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI were served by first class mail, postage prepaid, this day of May, 1980, upon each of the following:

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